

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 24Sep2002

CASE NO.: 2002-CAA-6

IN THE MATTER OF:

SHEILA KNIGHT

Complainant

v.

RUSSELLVILLE HOSPITAL

Respondent

APPEARANCES:

SHEILA KNIGHT, PRO SE

Complainant

PATRICK F. CLARK, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Clean Air Act, 42 U.S.C. § 7622, et seq., (herein the CAA or Act) and the regulations promulgated thereunder at 29 C.F.R. Part 24.

On or about December 1, 2001, Sheila Knight (herein Complainant or Knight) filed an administrative complaint against Russellville Hospital (herein Respondent) with the U.S. Department of Labor (DOL) complaining of various violations of the CAA and Occupational Safety and Health Act administered by the Occupational Safety and Health Administration (OSHA), including her alleged November 7, 2001 termination by Respondent. (ALJX-1, 4). On December 12, 2001, DOL advised Complainant that

her complaint was being dismissed because it was filed in an untimely manner.

On or about December 22, 2001, Complainant appealed DOL's determination to the Office of Administrative Law Judges. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order issued scheduling a formal hearing in Birmingham, Alabama, which was held on April 23, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs. The following exhibits were received into evidence:¹ Complainant's Exhibits Nos. 1-6, 8-12, Administrative Law Judge's Exhibits Nos. 1-8 and Respondent's Exhibits Nos. 7-8, 10, 11, 15-16.

Complainant and Respondent filed written post-hearing briefs on July 11 and July 15, 2002, respectively. Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. PROCEDURAL MATTERS

Pursuant to the Pre-Hearing Order, on January 25, 2002, Complainant filed a formal complaint detailing the nature of each and every violation of the CAA as well as the relief sought. (ALJX-4). On March 15, 2002, Respondent filed its "Answer" to Complainant's Submission, indicating it had not received service of the complaint, generally denying any possible allegations and raising five affirmative defenses with "an abundance of caution." On March 26, 2002, Respondent filed an "Amended Answer and Defenses" pursuant to the Revised Pre-Hearing Order of March 18, 2002. Respondent maintained its five affirmative defenses and detailed its denial of specific allegations asserted by Complainant.

II. ISSUES

- A. The applicability of the Clean Air Act.
- B. Whether Claimant engage in activities protected under the Clean Air Act.
- C. Whether Respondent discriminated against Complainant in retaliation for her alleged

¹References to the record are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge's Exhibits: ALJX-____.

protected activities.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Complainant

Complainant worked for Respondent from March 1994 through November 7, 2001. She began as a receptionist, transferred to the Emergency Room as a clerk and was promoted eventually to Admissions Supervisor, a position she held for the last five years of her employment. Complainant is currently unemployed. (Tr. 65).

Complainant testified she worked in the Human Resources building the last three to four years of her employment. Her office was next to the furnace room, separated by a wall. There were two other offices in the building, including Medical Records and the Human Resources Director, as well as a computer training room. The Medical Records office was about fifty feet from her office at the other end of the building. (Tr. 65-66).

Complainant stated she had complained to maintenance about gas fumes in her office for many years. She testified Mr. Walt Frederick of the maintenance department was notified three years earlier and checked the furnace in the building for gas leaks. Complainant was told at that time the fumes were strong because the furnace was being turned on after not being used all summer. Maintenance also told her the gas was never cut off, even when the furnace was not in use. (Tr. 112). Complainant testified she did not know of any other systems which ran on gas, or if the gas was kept on out of necessity. (Tr. 73-74, 90). Complainant also noticed gas fumes in her office in July 2001, before she took her medical leave, and in September 2001, when she returned. She stated she did not report the fumes because she was previously told there was nothing wrong. (Tr. 89-90). On cross-examination, Complainant testified she submitted these complaints to maintenance, not her supervisor, Mr. John Stonecipher. (Tr. 100).

Complainant took medical leave in July and August 2001. During this time her physician, Dr. Keith Morrow, diagnosed her with chest pains, palpitations, shortness of breath and anxiety. He could not find the cause of these problems, but he did not relate them to any environmental matters at Complainant's workplace at that time. She is still under the treatment of Dr.

Morrow. (Tr. 66-68, 90).

Complainant testified her symptoms improved during the weekends when she was at home and away from the office. Nonetheless, she never requested to be moved to another office or building. It had been brought up in the spring of 2001 that she might be moved to the hospital to be nearer to her employees, but there was not enough office space. She testified other employees had complained of having shortness of breath. (Tr. 95-97). Because of her health problems, Complainant started to do a lot of her work from home, keeping in contact with the office via beeper and phone. She testified her beeper often did not work out in the rural area where she lived, even after she had the frequency increased. (Tr. 89).

Complainant testified she submitted her resignation to Mr. Stonecipher on October 23, 2001, indicating her last day of employment would be November 19, 2001. She stated she resigned because her persistent health problems made it impossible for her to continue to work for Respondent. (Tr. 66, 76). On cross-examination, Complainant stated that at the time of her resignation she did not believe her health problems were due to gas exposure. She acknowledged having personal problems with her sister, who also worked for Respondent. She further stated her sister was "not in a mind to kill her," but testified such problems did not impact her decision to resign. (Tr. 104-105).

Complainant testified that when she opened her office door Friday, October 26, 2001, she was overwhelmed with gas fumes. (Tr. 66). She stated she vaguely smelled the fumes on October 23, 24 and 25, but did not complain to anybody on those days. (Tr. 74-75). On October 26, 2001, Complainant called maintenance and Mr. Frederick came to fix the problem but indicated to her nothing was wrong. Complainant then asked Mr. Stonecipher about notifying OSHA and the EPA because she was worried Respondent would not be able to handle the problem and she did not want her co-workers to experience health problems. Mr. Stonecipher told her that was not her responsibility. Complainant testified this all happened on October 26, 2001. (Tr. 66-67, 74, 77).

After discovering the problem with the furnace, Complainant associated it with her health problems, but it is still not known if the two are medically related. She believed if the furnace was fixed her health problems would resolve and she would be able to continue working at Respondent. Complainant testified she resigned because of her health problems, but she did not want to quit, therefore, she sought to rescind her resignation on Monday, October 29, 2001. (75-76, 83, 95). Mr. Stonecipher told her this would not be possible as her resignation had already been

processed with Human Resources on October 23, 2001. He e-mailed her, stating her position "had been approved, posted and the interview process had begun, as of October 31, 2001." (Tr. 75-77, 83).

Complainant testified she did not think Mr. Stonecipher knew of her past complaints to maintenance when she resigned on October 23, 2001. However, she believes Mr. Stonecipher refused to rescind her resignation on October 31, 2001, because of the internal complaints she had made to maintenance regarding gas fumes. (Tr. 93-94, 100). On cross-examination, Complainant stated she had complained to Mr. Stonecipher on October 31, 2001, about having to work around maintenance, but she acknowledged this occurred after he refused to rescind her resignation. On that day, via e-mail, her request to rescind her resignation was denied at 8:43 a.m., she complained about "working around maintenance" at 11:11 a.m. and she asked about whether she should contact OSHA or the EPA at 2:57 p.m. (Tr. 101-103; EX-13; EX-15; EX-16).²

Complainant contacted OSHA for the first time on November 2, 2001. She talked with the local OSHA representative, Mr. Ed Keith, and informed him of the fumes in her office and maintenance's inability to remedy the problem. Complainant stated she felt her illnesses were related to this problem. She testified Mr. Keith told her to keep him informed and that he would pass the information on to his superiors. He informed Complainant that an investigation would take place, especially after she related she was told by Respondent it was not her responsibility to inform OSHA. (Tr. 68-69).

Complainant also informed Mr. Keith of Respondent's refusal to rescind her resignation and she was informed it was "probably retaliation." However, Complainant testified that OSHA investigators also told her they did not investigate such issues. (Tr. 78-79, 87).

Complainant last worked on November 7, 2001. Complainant testified she was sick that day, and her husband called the office to report he was dropping off some papers for her. He talked to Ms. Cheryl Lee, who told him if Complainant did not

² I note this conflicts with Complainant's earlier testimony that she had asked if she should contact OSHA on October 26, 2001. However, her current testimony that she inquired about contacting OSHA on October 31, 2001, is corroborated by Mr. Stonecipher's testimony and RX-15.

return to work she should not come back to work at all. (Tr. 80).

Complainant first spoke with an OSHA investigator, Mr. Don Cameron, on November 13 or 14, 2001. He recommended Complainant file a formal complaint, which entailed sending OSHA a letter detailing the situation. Complainant filed her formal complaint by sending a letter to OSHA in Atlanta, Georgia. Ms. Annette Smith was the investigator assigned to her case.³ The complaint addressed both the gas fumes and Complainant's health problems as well as Respondent's refusal to rescind her resignation. It did not include any complaints regarding the ambient air, but was restricted to air within her office building. (Tr. 70-71, 82-84).

Complainant testified OSHA representatives told her during a phone conversation on November 14, 2001, that they opened her whistleblower case. The representatives asked Complainant to gather all of her documentation and told her a field investigator would be assigned to her case. (Tr. 85-86). Complainant testified she never told any of her co-workers about her contact with OSHA or her resignation problems and no one from Respondent indicated they would "get her" for reporting to OSHA. Complainant stated Respondent would probably have first found out about her contact with OSHA in November 2001. (Tr. 88, 91-92).

Complainant then testified Robert Sanchez, of OSHA, sent her a letter dated November 29, 2001, stating Respondent was not in OSHA's jurisdiction, but they would continue with the whistleblower part of her complaint. (Tr. 71, 128; CX-12). Complainant filed her CAA complaint following receipt of this letter. She testified she would have received Sanchez's letter no earlier than November 30, 2001, and she probably mailed her CAA complaint no earlier than December 1, 2001. (Tr. 129-131). Complainant received a letter dated December 12, 2001, from Ms. Cindy Coe of DOL, stating her CAA complaint was filed untimely and thus dismissed. (Tr. 79-82).

Complainant also testified she had numerous conversations with Mr. Anthony Incristi, a Regional Supervisory Investigator with OSHA, in December 2001. Mr. Incristi advised Complainant to file a formal complaint under the CAA, but the deadline had already passed. He informed Complainant that his supervisor, Ms.

³ While the correspondence between Complainant and OSHA is not dated, Complainant testified this all took place during November 2001.

Coe, would send her a letter detailing what needed to be done to file the appeal.⁴ (Tr. 72-73).

Greg Knight

Mr. Knight is Complainant's husband. He testified that on November 7, 2001, he called Respondent to tell them he would run Complainant over to drop off papers but then he was going to take her home because she was sick and vomiting. He talked with Ms. Cheryl Lee. Mr. Knight testified Ms. Lee told him she had spoken with Mr. Stonecipher and if Mr. Knight did not drop Complainant off immediately she may as well not show up to work again. Mr. Knight asked if this meant Complainant was fired and he testified Ms. Lee then hung up the phone on him. (Tr. 117).

Mr. Knight testified he did not go to Complainant's office to protect her from her sister. He also testified Complainant spoke with OSHA on November 7, 2001, from her office. (Tr. 119, 121).

Greg Allen

Mr. Allen is the Director of Plant Operations for Respondent, a position he has held for over five years. His duties include the oversight of maintenance and repair of the hospital and medical office buildings. (Tr. 20).

On October 26, 2001, Mr. Allen was notified that Complainant had reported gas fumes in the Human Resources building. He testified he and gas company employees checked out the complaint but found nothing. On October 29, 2001, a second employee reported gas fumes in the building and the gas company employees returned, but again found nothing. Mr. Allen testified the gas company recommended the furnace room be ventilated. (Tr. 21-23).

On October 29, 2001, in response to the second complaint, Mr. Allen installed a carbon monoxide sensor which ran for six or seven hours without detecting anything. On the morning of October 30, 2001, Mr. Allen was notified that the sensor's alarm sounded. He testified the gas company returned and detected "30

⁴ I note this is inconsistent with Complainant's earlier testimony that she immediately filed a complaint under the CAA on or about December 1, 2001. (Tr. 131). However, in her post-hearing brief, Complainant stated she mailed her complaint on December 8, 2001, because her computer indicated the file's creation date was December 7, 2001.

to 40 parts a million of carbon monoxide in the office." They recommended cutting a louver into the equipment room door and thoroughly cleaning the furnace and burners. (Tr. 22).

Mr. Allen testified that after he cleaned the furnace, he noticed the burner chamber temperature was over 170 degrees when it should run at about 140 degrees. He determined the unit was not moving enough air through it to keep cool. Mr. Allen decided to replace the return-air grills in the adjacent offices and cut an additional discharge register in the furnace room door. (Tr. 22-23). He testified he needed to get into Complainant's office to replace one of the return-air grills for the furnace. He could not find his key and, as Complainant was not at work for several days, he drilled the key-way lock out and entered her office. He replaced the lock with a new key. (Tr. 24-25). On cross-examination, Mr. Allen testified Complainant had been out of the office "a lot" and he waited a few days for her to return before removing the lock and entering her office. (Tr. 26).

On cross-examination, Mr. Allen testified the carbon monoxide sensor was placed where gas fumes were reported the second time, which was about thirty feet away from Complainant's office on the medical records end of the Human Resources building. (Tr. 26-27).

Mr. Allen also testified the gas company recommended removing a section of the dropped ceiling in the furnace room which he did, although he did not remove any part of the ceiling in Complainant's office. (Tr. 25).

Mr. Allen stated the carbon monoxide sensor has not gone off since October 30, 2001. Sometime after November 5, 2001, a third-party company, Enser, which does industrial hygiene testing, detected zero levels of carbon monoxide or other contaminants in the building. (Tr. 28).

Thomas Rice

Mr. Rice is a maintenance worker for Respondent. He testified he was first notified about the gas leaks on October 29, 2001. He had not heard of any other complaints before this date. (Tr. 31).

On October 29, 2001, Mr. Rice was called into the Human Resources building to check for the carbon monoxide leaks. He testified he cut into the return-air duct to make sure the furnace was not blocked or stopped up, which it was not. Next, he cut into the supply duct, but there were no problems there

either. He then went into the bathroom and cut a return vent into the bottom of the furnace so it could get more air. (Tr. 32-33). None of these procedures alleviated the overheating of the furnace, therefore Mr. Rice tried to get into Complainant's office to put another return-air vent into the furnace, but the office was locked. He stated he was not present when Mr. Allen removed the lock from Complainant's office door. (Tr. 33).

Mr. Rice testified he never stated the building had "tested positive for carbon monoxide poisoning." He did not know when the carbon monoxide sensor was installed, although he testified the alarm went off on October 30, 2001. (Tr. 30, 33-34). He stated he never made a remark to anyone about Complainant "calling OSHA." (Tr. 31).

Isaiah Jerome Jackson

Mr. Jackson, a maintenance mechanic, testified he was not involved in checking for any gas leaks or carbon monoxide poisoning in Respondent's buildings. He never stated the carbon monoxide poisoning had proven positive. Mr. Jackson testified the maintenance workers discussed carbon monoxide poisoning testing in their department, but had not given any information to other staff members. He also stated he was never involved in a conversation regarding Complainant's call to OSHA. (Tr. 34-35).

Mr. Jackson testified that on October 30, 2001, he removed a ladder from Complainant's office as well as some tools and insulation from a supply duct which was part of the furnace system. He stated the insulation was not from the ceiling. (Tr. 36).

Mr. Jackson further testified he was never aware of any complaints about gas leaks prior to October 26, 2001. He was not involved with the carbon monoxide testing but was aware that a carbon monoxide monitor had been installed, although he was not responsible for checking it. He stated the emissions from the operation of the furnace chamber are discharged into the atmosphere but the heat itself goes to each room through the supply ducts. Mr. Jackson testified to his knowledge the emissions into the atmosphere have never been tested. (Tr. 36-37).

Esther Benson

Ms. Benson works in the medical records section of the Human Resources building, at the opposite end from the human resources division where Complainant worked. She testified she smelled gas

fumes in the building beginning in the fall of 2001, after they started turning on the heat in the building. Ms. Benson did not smell gas fumes in the spring of 2001 "when the coaters moved" into the building. (Tr. 38-40).

Ms. Benson testified other people in her department stated they smelled gas fumes in the building, however maintenance workers never told her "the carbon monoxide poisoning tested positive." (Tr. 40).

Ms. Benson testified she did not experience physical problems as a result of the gas fumes. She stated she smelled the fumes when she turned the heat on in the morning but they were not overpowering. She never smelled the fumes when she walked into her office and she did not report the odors to anyone. (Tr. 40-41).

On cross-examination, Ms. Benson testified she started smelling the gas fumes in the fall of 2001, and probably only for one week total. She did not think much of the smell as she had been raised with natural gas stoves and was accustomed to gas smells. She was not present when the carbon monoxide monitor went off, but was told by a co-worker that it did. (Tr. 42-43).

Susan Minor

Ms. Minor currently works at ECM East but worked in Respondent's Human Resources-MOB building in Russellville for almost two years. She has not worked in the building since October 2000. Ms. Minor testified she does not remember smelling gas fumes while working in the Respondent's personnel building, nor does she remember co-workers complaining of such fumes. (Tr. 44-46).

Sandra Williams

Ms. Williams worked in the Human Resources building for about one year, until October 2000 when she was transferred to the hospital's admitting office. While she was in the Human Resources building she did not smell any gas fumes. (Tr. 47-48).

Ms. Williams testified Complainant requested an inter-office e-mail, or MOX, which stated Complainant no longer worked for Respondent. Ms. Williams refused to provide Complainant with the MOX, stating she did not want to get involved with the situation. She testified she was never told she could not contact Complainant and she did not feel her job would be threatened if she did contact Complainant. (Tr. 48-49).

On cross-examination, Ms. Williams testified she had been under the direct supervision of Complainant since October 2000. Ms. Williams stated she had difficulty communicating with Complainant in the final months leading up to Complainant's resignation. Ms. Williams testified Complainant would not answer her beeper or phone, or would not be at home when she stated she would be there. (Tr. 50-51). Ms. Williams clarified it was Complainant's unavailability which caused problems, not the quality of their communications. However, she also testified she spoke with Complainant very seldom in the last two months of her employment and if there is no availability, there is no quality. Ms. Williams also stated she did not see Complainant much because they worked in separate buildings after October 2000. (Tr. 52).

Catherine Davis

Ms. Davis testified Complainant had requested a copy of the "MOX" from her, but she did not release it because she was told it contained confidential hospital information and she was worried it would be traced back to her computer if anything went to court. Ms. Davis testified the MOX stated Ms. Linda Willis would be their new manager until someone was hired permanently to replace Complainant. She stated she was never reprimanded for speaking to Complainant nor did Complainant ever ask her specific confidential questions. (Tr. 54).

Ms. Davis testified she never smelled gas fumes in the Human Resources building in which Complainant's office was located. (Tr. 55). On cross-examination, she testified Complainant never asked her if she smelled gas in the building, although one time Complainant told Ms. Davis during a phone conversation she smelled gas fumes. Ms. Davis testified that sometime after her resignation, Complainant stated the gas leaks would lead to another lawsuit. (Tr. 61).

On further cross-examination, Ms. Davis stated she was an emergency room clerk and reported to Complainant for the two years they worked for Respondent together, although they worked in different buildings. Ms. Davis also testified to her inability to contact Complainant during the last month of her employment, stating Complainant was frequently out of the office. However, Ms. Davis stated if she needed Complainant but could not reach her, she would call somebody else; she did not testify Complainant failed to return her messages. (Tr. 58-60).

Ms. Davis also testified Complainant called her at home to tell her she was resigning from Respondent because "she just couldn't handle it anymore." Ms. Davis explained that

Complainant stated "her nerves couldn't take it anymore." She stated that in October 2001 Complainant then sent a MOX indicating she was resigning, but did not give a reason for her resignation. (Tr. 55-56; RX-8). Ms. Davis testified Complainant indicated her resignation was related to her family problems, specifically with her sister who also worked for Respondent. Complainant called Ms. Davis when she was upset and Ms. Davis tried to help by talking to Complainant to calm her down. The discussions occurred at the same time Complainant submitted her resignation and thereafter. (Tr. 60).

John Stonecipher

Mr. Stonecipher is the Registration Manager for Coffee Health Group. He has held this position for two years, including the time period of October and November 2001. Coffee Health Group owns Respondent as well as ECM, Shoals, and ECM East Hospitals. Mr. Stonecipher is responsible for the registration departments in all four hospitals and supervises the registration managers in each hospital. His office is located at ECM East Hospital in Florence, Alabama, and he has authority to hire and terminate employees. (Tr. 134-136).

Mr. Stonecipher supervised Complainant who was the Admitting Manager at Respondent. Her responsibilities included directly supervising the hospital admit areas, PBX and emergency room registration. She supervised and scheduled about 15 or 16 employees in October 2001. (Tr. 136). Accessibility was an important part of Complainant's job responsibilities because she was needed to answer job training issues, deal with employees who called in sick and arrange for employees to take time off from work. (Tr. 136-137).

Mr. Stonecipher first received notice of Complainant's resignation at 9:55 a.m. on October 23, 2001, via e-mail. He accepted her resignation at 12:09 p.m. on the same day. Mr. Stonecipher testified that when he accepted Complainant's resignation he was not aware of any gas leaks at the Russellville Hospital, or that Complainant had voiced complaints regarding such gas leaks. (Tr. 137-138).

Mr. Stonecipher testified Complainant telephoned him on Monday, October 29, 2001, to retract her resignation. He declined her request because he had already processed her resignation, posted the job vacancy and began the replacement interview process. (Tr. 138). Mr. Stonecipher stated he prepared an Employee Status Report, an internal report vacating Complainant's position, signed the Notice of Position Open on

October 23, 2001 (RX-10), posted it on October 26, 2001, and immediately began to receive bids from other employees for the position. He testified he ultimately hired Ms. Nancy Denise Hill to replace Complainant. Ms. Hill bid for the position on October 26, 2001, but Mr. Stonecipher did not know what date she was hired. He testified the job bidding would have been kept open at least five days after the job was posted. (Tr. 139-141).

Mr. Stonecipher further testified Complainant had not notified him of gas leaks before she asked to rescind her resignation on October 29, 2001. He did not know of any complaints gas fumes at the Russellville Hospital by Complainant when he refused to rescind her resignation at 8:43 a.m. on October 31, 2001. He further testified that his decision to decline Complainant's request to rescind her resignation was not based, in any way, on her concerns about possible gas leaks at the Russellville Hospital. Mr. Stonecipher stated he did not receive an e-mail from Complainant until October 31, 2001, at 11:11 a.m. in which she explained her erratic hours, reasons for working at home and notifying him that maintenance detected carbon monoxide in her office. He confirmed that this was his first knowledge of a possibility of a gas leak at the Russellville Hospital. (Tr. 142-144).

Mr. Stonecipher also stated he did not terminate Complainant. He explained she had resigned and he decided she did not need to work out the rest of her notice. (Tr. 145).

Ms. Cheryl Lee

Ms. Lee is the Human Resources Director for Coffee Health Group and directly supervises the Human Resources managers at Respondent and Shoals Hospital. Ms. Lee's office is located in the Respondent's Human Resources Building. She testified she knows Complainant through their work relationship, but Complainant did not report to her. (Tr. 146-147).

Ms. Lee also testified that as Human Resources Director she had been made aware of performance issues with Complainant. Specifically, attendance issues and physicians' complaints of the lack of training for switchboard operators. Ms. Lee stated Complainant was responsible for training the switchboard operators. (Tr. 148).

Ms. Lee testified Mr. Stonecipher made her aware of Complainant's resignation. She stated he was Complainant's supervisor and had discretion to accept or deny Complainant's letter of resignation. Ms. Lee had a meeting with Complainant

and Ms. Christine Stewart, Respondent's Hospital Administrator, around October 25, 2001, regarding Complainant's resignation. Ms. Lee testified Complainant cited her health problems as the reason for her resignation. At no time was the issue of gas leaks discussed. (Tr. 148, 150-151).

Mr. Stonecipher also made Ms. Lee aware of Complainant's request to rescind her resignation. Ms. Lee testified, although Mr. Stonecipher had the discretion to accept or deny the request, he consulted with human resources and discussed the request with her. Ms. Lee stated gas leaks was not an issue discussed in this conversation. (Tr. 149).

Ms. Lee testified that on November 7, 2001, Mr. Stonecipher was on his way to meet with Complainant at her office when Complainant told her she was going to run some papers over to the hospital. Ms. Lee stated she asked Complainant if she would return to meet with Mr. Stonecipher because he had been trying to get in touch with her, and she responded "yes." However, after Complainant left with her husband for the hospital, her husband called to report he was taking Complainant home because she was sick and vomiting. Ms. Lee testified she was unaware Complainant was sick that day, and stated it was important for Complainant to return and meet with Mr. Stonecipher before she left for the day. She testified she did not indicate if Complainant did not return to work, she was fired. When Complainant's husband asked if Complainant was fired, Ms. Lee told him no, because she had already resigned. (Tr. 152-153).

The Contentions of the Parties

Complainant contends her office has a carbon monoxide gas leak which caused her current health problems and ultimately forced her to resign against her will from continued work with Respondent. Complainant asserts her internal complaints to maintenance and her contact with OSHA about the gas leaks are protected activity under the Clean Air Act. She argues the "EPA addresses ambient air as any air whether outside or inside," thus the CAA applies to her case. Moreover, Complainant asserts her initial CAA complaint, filed on December 8, 2001, was filed in a timely manner because it was filed as soon as she knew about the CAA.

Complainant asserts that after she found out about the gas leak, her supervisor, Mr. Stonecipher, refused to rescind her resignation. He told Complainant it was not her duty to contact OSHA or the EPA. Complainant argues that although her resignation was already accepted and processed at the time she

tried to rescind, Respondent should have offered her another position. She contends Respondent's unwillingness to do so constituted retaliation in violation of the CAA.

Respondent contends the CAA does not apply in this case because the complaint refers to air inside her office building, not ambient, outside air as required by the CAA. Additionally, Complainant filed her complaint in early December, more than thirty days after the alleged violation occurred on October 31, 2001. As such, Respondent argues, the complaint was not timely filed and DOL was correct to dismiss it.

Respondent further contends that even if the CAA did apply and Complainant timely filed her complaint, no violation occurred because she failed to present evidence of retaliatory actions on the part of Respondent. Specifically, Complainant failed to show Mr. Stonecipher was aware of her complaints at the time he declined to rescind her resignation. Respondent further contends that, assuming retaliation could be shown, Respondent had a legitimate, nondiscriminatory reason for not rescinding Complainant's resignation. Her position vacancy was approved, a vacancy notice was posted and her co-employees began to bid for the job before Complainant attempted to rescind her resignation. Therefore, assuming Complainant's activities were protected by the CAA, Respondent argues no violation occurred thereunder.

IV. DISCUSSION

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the

transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F. 2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard to the logic of probability and the demeanor of witnesses.

A. The Applicability of the Clean Air Act

Although commonly known as the Clean Air Act, the statute was passed by Congress as the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), amending the 1967 Air Quality Act, Pub. L. No. 90-148, 81 Stat. 485 (1967). The 1970 legislation was later amended in 1977 and 1990.

The CAA only gives the Environmental Protection Agency (EPA) authority to regulate "air pollutants," and defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is **emitted into or otherwise enters the ambient air.**" See 42 U.S.C. § 7602(g)(emphasis added). See Johnson v. Old Dominion Security, Case No. 1986-CAA-3 @ 8, n. 8 (Sec'y May 21, 1991)(complaints about contamination of workplace air, contained within a building, structure, facility or installation which is not emitted into the external atmosphere, would not be covered under the CAA).

The CAA establishes National Ambient Air Quality Standards (NAAQSs) applicable on a nationwide basis. 42 U.S.C. § 7602(u). These standards are referred to as "harm-based" because the mandated quality levels are set by reference to ambient levels of pollutants that would limit harm to human health and the

environment to acceptable levels.⁵

The NAAQS regulations define "ambient air" as "that portion of the atmosphere, **external to buildings**, to which the general public has access." 40 C.F.R. § 50.1(e)(emphasis added). Moreover, the EPA's regulations governing air pollution define it as "the presence in the **outdoor atmosphere**" of pollutants. 40 C.F.R. § 35.501-1 (4th Ed. 1972)(emphasis added). See Kemp v. Volunteers of America of Pennsylvania, Inc., Case No. 2000-CAA-6 @ 4 (ARB Dec. 18, 2000).

Indoor pollution has been the subject of recent comment in which it was recognized that the "impact of individual pollutants depends on a number of factors such as toxicity, concentration, duration of exposure and sensitivity of those exposed . . . Over time, these emissions, called 'off-gassing' gradually decrease." "Insufficient ventilation, resulting in poor air exchange, can intensify indoor air pollution."⁶ However, the "CAA provides very little protection for those exposed to indoor air pollution. The CAA improves indoor air indirectly through its programs to lower the concentrations of air pollution in the outdoor or ambient air." "Indoor air in the workplace is subject to regulation under the OSH Act. The OSH Act applies to most private sector businesses."⁷

It has been observed that "the EPA . . . has consistently limited itself to regulating outdoor air quality under the Clean Air Act . . . because ambient air has universally been construed to mean the outdoor air."⁸ Moreover, it has been recognized

⁵ Zygmunt J.B. Plater, et al., Environmental Law and Policy: Nature, Law and Society, at page 441 (2d Ed. 1998). Therein, the authors validate the Clean Air Act does not address indoor air quality. Id., n. 1.

⁶ The federal government currently has no standards for ventilation, and it is therefore regulated by local building codes which may address concerns other than indoor air quality. See Office of Air and Radiation, U. S. Environmental Protection Agency, Fact Sheet: Ventilation and Air Quality in Offices. (April 2, 1997).

⁷ Arnold W. Reitze, Jr. and Sheryl-Lynn Carof, The Legal Control of Indoor Air Pollution, 25 B.C. Env'tl. Aff. L. Rev. 247, at 249-250, 254, 258 (1998).

⁸ Laurence S. Kirsch, The Status of Indoor Air Pollution Litigation, C432 A.L.I.-A.B.A. 317, 358-359 (1989).

that the EPA "has never attempted to regulate **indoor** air quality under the auspices of the Clean Air Act and no statute currently grants it unambiguous authority to do so. The CAA gives the EPA authority to regulate any pollutant that enters the ambient air."⁹ Yet, EPA regulations interpreting the CAA are specifically tailored to addressing only problems in **outdoor** air.¹⁰

Complainant's complaint alleges clean air violations **in the Human Resources Building** of Respondent's hospital. (See ALJX-4, p. 1). At the hearing, Complainant testified her complaint focused on the air inside her office building, not the ambient air. Moreover, Complainant went to OSHA out of concern for her co-workers' health, not pollution of the environment. Assuming, **arguendo**, that any amounts of vapors or fumes escaped into the outdoor atmosphere, there is no evidence as to the toxicity involved in such materials, whether such vapors or fumes constituted measurable concentrations or just negligible amounts of "pollutants" or whether such "contaminants may have caused any adverse effects on the health of the general public by duration or resulting sensitivity."¹¹

Accordingly, in view of the foregoing, I am constrained to find and conclude that the Clean Air Act is inapplicable to any **indoor** air quality complaints which form the basis of Complainant's complaint. Complainant's reliance upon her complaints of fumes in 1998, in support of a pattern, practice or failure of Respondent to comply with past citations in connection with the events allegedly occurring in 2001, is too temporally remote and is unpersuasive. Consequently, I further find and conclude that Complainant's actions do not conform to the activities protected by the employee protective provisions of the

⁹ Steve Kelly, Indoor Air Pollution: An Impetus for Environmental Regulation Indoors?, 6 BYU J. Pub. L. 295 (1992).

¹⁰ See Grace C. Guiffrida, The Proposed Indoor Air Quality Acts of 1993: The Comprehensive Solution to a Far-Reaching Problem?, 11 Pace Env'tl. L. Rev. 311 (1993).

¹¹ Although the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994), provides minimal control over indoor air, it is concerned primarily with the control of releases into the environment which includes the ambient air. However, the term "release" excludes "any release which results in exposure to persons solely within the workplace"

CAA.

Notwithstanding the foregoing, arguably Complainant's claim may come within the purview of the Clean Air Act if she reasonably perceived Respondent violated the CAA. See Aurich v. Consolidated Edison Co. of New York, Inc., Case No. 1986-CAA-2 @ 3 (Sec'y Apr. 23, 1987); Minard v. Nerco Delamar Co., Case No. 1992-SWD-1 @ 5 (Sec'y Jan. 25, 1994). However, the Act does not protect an employee who subjectively thinks the complained of employer conduct might affect the environment. Crosby v. Hughes Aircraft Co., Case No. 1985-TSC-2 @ 26 (Sec'y Aug. 17, 1993); Kesterson v. Y-12 Nuclear Weapons Plant, Case No. 1995-CAA-12 @ 2-3 (ARB Apr. 8, 1997). "The substance of the complaint determines whether activity is protected under the particular statute in issue." Johnson v. Old Dominion Security, *supra*, @ 5. Accordingly, I shall consider whether Complainant is entitled to a finding and conclusion that Respondent discriminated against her for her alleged activity based on this perception.

B. Timeliness

Assuming, **arguendo**, the CAA is applicable to this case (which I have found it is not as Complainant does not raise issues concerning ambient air) Complainant's complaint to DOL was untimely filed. The CAA states in pertinent part:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file a complaint with the Secretary of Labor alleging such discharge or discrimination.

42 U.S.C. § 7622(b)(1). A complaint filed by mail is deemed filed on the day it was mailed, not the day it was received. 29 C.F.R. § 24.3(b).

Complainant's CAA complaint filed with DOL is undated. A letter received by Complainant from DOL dismissing her claim was dated December 12, 2001. At the hearing, Complainant testified she filed her CAA complaint immediately after OSHA dismissed her claim on November 29, 2001. She stated she would have filed her CAA complaint on December 1, 2001, at the earliest. However, Complainant also testified she had talked with Mr. Incristi several times in early December 2001, and he advised her to file a CAA complaint. In her post-hearing brief, Complainant asserts she filed her CAA complaint on December 8, 2001. This is based on her computer records which indicate the complaint was created on December 7, 2001, and she stated she most likely mailed the

complaint the next day. This is most consistent with her prior testimony of her conversations with Mr. Incristi in early December and her receipt of the DOL's letter dismissing her claim, which was dated December 12, 2001.

Section 7622(b)(1) requires a complaint alleging unlawful discharge or discrimination must be filed within thirty days of the occurrence of such violations. In the present case, Complainant requested to rescind her resignation on October 29, 2001. Mr. Stonecipher refused this request on October 31, 2001, thus that is the date of the alleged adverse employment action. Thirty days from October 31, 2001, is November 30, 2001. Therefore, Complainant had until November 30, 2001, to file her CAA complaint.

As the date of mailing is the date of filing, Complainant did not file her CAA complaint until December 8, 2001, when she mailed it. This was nine days past the deadline of November 30, 2001. Thus, her complaint was not filed in a timely manner and must be dismissed on those grounds.

C. Complainant's Prima Facie Case

Assuming, **arguendo**, that Complainant had timely filed her complaint with the DOL and the Clean Air Act applied to her case, I now turn to whether Respondent committed a violation thereof. The protective employee provision of the Clean Air Act, in pertinent part, provides:

No employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . .

- 1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter. . .
- 2) testified or is about to testify in any such proceeding, or
- 3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any

other action to carry out the purposes of this chapter.

The Secretary of Labor has repeatedly articulated the legal framework under which parties litigate in retaliation cases. Under the burdens of persuasion and production in whistleblower proceedings, Complainant must first present a **prima facie** case of retaliation by showing:

- 1) that the Respondent is governed by the Act;
- 2) that Complainant **engaged in protected activity** as defined by the Act;
- 3) that the Respondent **was aware of that activity** and took some adverse action against Complainant; and
- 4) that an inference is raised that the protected activity of Complainant was the likely reason for the adverse action.

See Hoffman v. Bossert, Case No. 1994-CAA-4 @ 3-4 (Sec'y Sept. 19, 1995); Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995).

Respondent may rebut Complainant's **prima facie** showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant may counter Respondent's evidence by proving that the legitimate reason proffered by the Respondent is a pretext. See Yule v. Burns International Security Service, Case No. 1993-ERA-12, @ 7-8 (Sec'y May 24, 1994). In any event, Complainant bears the burden of proving by a **preponderance** of the evidence that she was retaliated against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Dean Darty v. Zack Company of Chicago, Case No. 1982-ERA-2, @ 5-9 (Sec'y Apr. 25, 1983)(citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981)).

Since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether Respondent rebutted that showing. See Carroll v. Bechtel Power Corp., Case No. 1991-ERA-46, @ 11, n. 9 (Sec'y Feb, 15, 1995), aff'd sub nom. Bechtel Power Corp. v. U. S. Department of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996).

Once Respondent has produced evidence that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason,¹² it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If she did not, it matters not at all whether she presented a **prima facie** case. If she did, whether she presented a **prima facie** case is not relevant. Adjiri v. Emory University, Case No. 1997-ERA-36 @ 6 (ARB July 14, 1998).

The undersigned finds as a matter of fact and law that, for purposes of this discussion, Respondent is arguably a covered employer within the meaning of the CAA. Respondent does not contend otherwise.¹³ Moreover, I further find Respondent has articulated a legitimate, nondiscriminatory reason for its refusal to rescind Complainant's resignation because it had already posted the vacancy and began the interview process.

The pivotal issue is whether Complainant prevailed on the ultimate question of liability by a **preponderance** of the evidence. I find that she did not.

As noted above, the substance of Complainant's complaint determines whether her activity is protected under the CAA. Since Complainant proceeded pro se, a brief analysis of the elements of her **prima facie** case is warranted.

Knight conceded she smelled gas fumes in her office in July 2001, before she took medical leave, and in September 2001, when she returned. She testified she did not report these fumes until

¹² Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for Respondent. Texas Department of Community Affairs v. Burdine, supra, at 253, 256-257. However, Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id.

¹³ I note that States have sovereign immunity from federal administrative proceedings invoked by state employees to vindicate federal whistleblower protections. Rhode Island Dep't fo Env'tl. Mgmt. v. U.S., ___F.3d___, 2002 WL 1974389 (1st Cir. Aug. 30, 2002). However, Respondent did not raise this issue as a defense. Nonetheless, if Respondent is indeed a State owned and operated entity it may enjoy sovereign immunity in this matter.

October 2001, because she complained of the same gas fumes three years earlier and was told by maintenance that nothing was wrong. She filed a report with Respondent's Maintenance Department on October 26, 2001, after resigning her employment on October 23, 2001, voicing concerns about a possible gas leak from the furnace located next to her office. On October 30, 2001, carbon monoxide was detected in the Human Resources building at the opposite end from Complainant's office. The record is devoid of any evidence of the toxicity or amount of gas fumes external to Complainant's office building and there has been no showing of any "adverse effects on the health of the general public," which are persuasive factors in measuring the impact of pollution in the ambient air protected by the CAA. Accordingly, Complainant has failed to establish her activity was protected under the CAA.

Where the decision-makers had no knowledge of any protected activity at the time the alleged adverse decision was made, there can be no causal connection. At a minimum, a complainant must establish that the employer was actually aware of protected expression at the time of the adverse employment action decision. Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). Here, the record is clear that Mr. Stonecipher was not aware of Knight's complaints about the possible gas leak when he refused to rescind her resignation. On October 26, 2001, Complainant notified Maintenance of the gas leak, not Mr. Stonecipher, as she had with all past complaints. The evidence indicates Complainant informed Mr. Stonecipher on October 31, 2001, that she believed her health problems were caused by a carbon monoxide leak in her office. Complainant conceded this communication occurred **after** she requested he rescind her resignation and **after** he declined to do so. (See Tr. 101-103; CX-3; CX-4). Furthermore, Mr. Stonecipher testified he was unaware of any gas leaks when he accepted Complainant's resignation and then denied recision thereof. As such, Complainant has not established Mr. Stonecipher knew of her complaints about the gas leak when he did not rescind her resignation.

I find and conclude Complainant's subjective perception of an alleged violation under the CAA was "not grounded in conditions constituting reasonably perceived violations" under the CAA. Her complaint of contamination of her office air is not protected by the CAA and her supervisor was not aware of her complaint when he refused to rescind her resignation. See Kesterson, supra, at 3.

Accordingly, I find and conclude that Complainant's perception of Respondent's violation of the CAA was not reasonably based. Therefore, I further conclude that

Complainant's activity was not protected. Having concluded Knight's complaint activity was unprotected, it is axiomatic such activity could not be the basis for an inference that her activity was a "likely reason for the adverse action" taken against Knight.

Having found Knight's conduct unprotected, since the substance of her complaints were not related to protected environmental matters, I further conclude that she has not established, by a preponderance of the probative evidence, discrimination against her by Respondent within the meaning of the CAA.

V. CONCLUSIONS

I find and conclude Complainant failed to establish by the weight of the record evidence that she was subjected to adverse action by Respondent because of her alleged protected activity. The weight of the probative, credible evidence compels a conclusion that Complainant was not refused rescission of her resignation which effectively terminated her employment because of her alleged protected activities.

The burden is on the Complainant to establish that adverse action was meted out because of her protected activity. She clearly has not shown by the weight of the evidence that Respondent refused to rescind her resignation because she complained to maintenance about a possible gas leak in her office building. I so find and conclude.

For the reasons discussed above, I find and conclude that the Clean Air Act is inapplicable to the extant circumstances of this case. Moreover, I find and conclude Complainant filed her complaint in an untimely manner. I further find and conclude that Complainant failed to present any evidence to establish she was subjected to adverse employment actions because of her complaint activity, which I find was unprotected under the CAA. Thus, I find and conclude, based on the foregoing analysis, that Respondent properly denied Complainant's request to have her resignation rescinded because they had already processed and posted the vacancy and began the interview process for replacement. Respondent's decision constitutes a legitimate, nondiscriminatory business reason for considering Knight's resignation final, unrelated to her alleged protected activity.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire Record, Respondent has not unlawfully discriminated against Sheila Knight because of her alleged protected activity and her complaint is hereby **DISMISSED**.

ORDERED this 24th day of September, 2002 at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.